

DEC 13 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF SCHMIDT,

Plaintiff,

v.

AMERICAN INSTITUTE OF PHYSICS,

Defendant.

Case No. 04-cv-3774

Judge: Alexander Williams

**MOTION FOR LEAVE TO FILE
FIRST AMENDED AND CONSOLIDATED COMPLAINT**

1. Until recently, Plaintiff Dr. Jeff Schmidt represented himself pro se in this matter. The law firm of Howrey Simon Arnold & White, LLP and the Washington Lawyers' Committee for Civil Rights and Urban Affairs have agreed to take over his representation. Pursuant to Fed. R. Civ. P. 15(a), and District of Maryland Local Rule 103(6), Plaintiff respectfully moves for leave to file a First Amended and Consolidated Complaint.

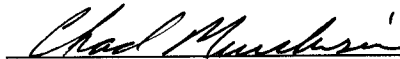
2. The purpose of the amendment is to more fully set forth the facts and legal arguments supporting the causes of action that Dr. Schmidt filed pro se.

3. The amendment also incorporates the previously and separately filed 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, et seq., claims for the efficiency and convenience of the Court.

4. The proposed changes involve the same facts and parties. Moreover, this case is in its infancy and amending the complaint will not unduly prejudice Defendant.

5. As required by Local Rule 103(6)(d), Plaintiff's counsel has conferred with defense counsel on several occasions, by telephone, concerning this motion. Defense counsel sent AIP a copy of the proposed Amended Complaint on December 7, 2004. AIP is currently reviewing it. Defense counsel, however, was unable provide written consent before the deadline. Thus, in support of this motion, Plaintiff submits the accompanying Statement of Points and Authorities, which is incorporated herein.

Respectfully submitted,



Patricia G. Butler (#012844)
Chad Murchison (#16293)
Erik T. Koons
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800
(202) 383-6610 (Fax)

Warren K. Kaplan (#02661)
Washington Lawyers' Committee for Civil
Rights and Urban Affairs
11 Dupont Circle, NW Suite 400
Washington, DC 20036
(202) 319-1000

Dated: December 10, 2004

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF SCHMIDT,

Plaintiff,

v.

AMERICAN INSTITUTE OF PHYSICS,

Defendant.

Case No. 04-cv-3774

Judge: Alexander Williams

**STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION
FOR LEAVE TO FILE FIRST AMENDED AND CONSOLIDATED COMPLAINT**

On May 30, 2003, Dr. Jeff Schmidt ("Dr. Schmidt") filed a complaint pro se against defendant American Institute of Physics ("AIP") in the Superior Court of the District of Columbia, which alleged inter alia that AIP's termination of Dr. Schmidt's employment constituted a breach of contract and violated 42 U.S.C. § 1983. This case was removed to the United States District Court for the District of Columbia and subsequently transferred to this Court.

Dr. Schmidt's original complaint did not contain a cause of action under 42 U.S.C. § 1981. Counsel for Dr. Schmidt was retained on or about April 30, 2004, one month before the statute of limitations for a § 1981 claim expired. Recognizing that a motion to amend may not have been decided before the expiration of the statute of limitations, on May 28, 2004 counsel for Dr. Schmidt filed a separate 42 U.S.C. § 1981 complaint in the District Court for the District of Columbia to protect Dr. Schmidt's claim. See Docket No. 1:04cv00867. The District Court for the District of Columbia transferred Dr. Schmidt's § 1983 claim to the District Court for the District of Maryland on September 14, 2004. See Case No. 8:04-cv-02946 (AW).

In addition, Dr. Schmidt is incorporating a previously filed claim under Title VII of the Civil Rights Act of 1964, as amended, in 1991, 42 U.S.C. §§ 2000e, et seq., (Title VII). On July 20, 2004, Dr. Schmidt received a Dismissal and Notice of Rights letter from Acting Director Marie M. Tomasso of the U.S. Equal Employment Opportunity Commission notifying him that he had exhausted his administrative remedies and has a right to bring a private action within 90 days. Recognizing that the 90 days to file an action was about to run, on October 7, 2004, Dr. Schmidt filed a Title VII claim in the United States District Court for the District of Maryland. See Case No. 8:04-cv-03270 (AW). Dr. Schmidt subsequently amended his Title VII claim as permitted as a matter of course by Rule 15(a) of the Federal Rules of Civil Procedure on December 8, 2004. For the efficiency and convenience of the Court, Plaintiff now files this motion for leave to amend to more fully set forth the facts and circumstances surrounding the violation of Dr. Schmidt's civil rights under 42 U.S.C. § 1983 and to consolidate the three pending complaints.

Rule 15(a) of the Federal Rules of Civil Procedure provides for liberal amendment of pleadings and expressly states that leave to amend "shall be freely given when justice so requires." In the leading case construing this rule, Foman v. Davis, 371 U.S. 178, 182 (1962), the United States Supreme Court held that:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Id.; see also Diggs by Diggs v. Housing Authority, 67 F. Supp. 2d 522, 529 (D. Md. 1999). For the reasons set forth in Foman as discussed in greater detail below, this Court should grant Plaintiff's Motion for Leave to File First Amended and Consolidated Complaint.

The proposed First Amended and Consolidated Complaint supplements the May 30, 2003 complaint by more fully detailing the factual background and the legal allegations that support the causes of action that initially were filed pro se. The amendment also incorporates the previously filed 42 U.S.C. § 1981 and Title VII claims for the convenience of the court and in the interest of judicial economy.

Courts routinely grant motions to amend in circumstances just like these. See Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir. 1978) (holding that a pro se plaintiff should be given the opportunity to amend his 42 U.S.C. § 1983). The Court noted that its role was not to

act as an advocate for a pro se litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court.

Id. at 1153. Indeed, under Gordon, a district court has the discretion to either appoint a *pro se* plaintiff counsel or advised him in such a way that his “colorable claim” was presented properly to the court. Id. at 1152-53 (stating that if a pro se plaintiff has a “colorable claim . . . the district court should appoint counsel to assist him”). Thus, Mr. Schmidt, now represented by counsel, should be permitted to amend his complaint so as to more fully and appropriately allege a claim for damages under 42 U.S.C. § 1983.

In addition to the Gordon Court, District courts outside the Fourth Circuit have permitted pro se plaintiffs to amend their original complaint for the sake of judicial economy to include related employment discrimination claims in similar circumstances. See Childers v. Mineta, 205 F.R.D. 29, 32-33 (D.D.C. 2001). The Childers case involved a pro se plaintiff who later received a court appointed lawyer to handle her employment discrimination case against a government agency. See id. at 30. In addition to the claims before the court, the plaintiff in Childers was simultaneously litigating additional claims against the defendant through the administrative process. The government agency issued a Final

Agency Decision on June 18, 2001, which left plaintiff with 90 days to bring an action in the district court. The plaintiff filed a motion to amend her original complaint on August 23, 2001. Recognizing that the statute of limitations might expire prior to the court's ruling on the motion to amend, the plaintiff filed a separate action pertaining to the claims raised in the administrative process. The new claim stemmed from the same misconduct and defendants as the original complaint.

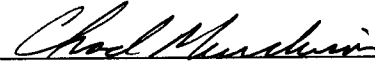
The Court granted the motion to amend and held that pro se litigants should receive "more latitude than parties represented by counsel." Id. at 31. The court further determined that the additional claims in the amended complaint involved many of the same facts and "[bore] a significant relationship to the original claims. . . ." Id. In addition, the court combined the two civil actions in the interest of judicial economy.

In granting motions to amend, the Fourth Circuit has held that "pro se complaints are held to less stringent standards than those drafted by attorneys." Martin v. Cox, 1994 U.S. App. LEXIS 26200, at *3 (4th Cir. Sept. 21, 1994). In the instant matter, the proposed changes stem from the same facts and parties. The proposed amendments to the complaint "do not radically alter the nature and scope of [the] litigation." Childers, 205 F.R.D. at 33 (D.D.C. 2001). To the contrary, the amendment streamlines the case by, among other things, consolidating previously filed claims into a single complaint. Moreover, amending the complaint will not unduly prejudice the defendant. This case remains in its preliminary stages (e.g., discovery has not commenced). Justice and fairness dictate that plaintiff be permitted to amend the complaint in order to clarify the claims and to promote the efficient disposition of this matter.

Accordingly, plaintiff respectfully requests that this Court grant his Motion for Leave to File First Amended and Consolidated Complaint.¹

¹ A copy of Plaintiff's proposed First Amended and Consolidated Complaint is attached hereto as Exhibit A.

Respectfully submitted,



Patricia G. Butler (#12844)

Chad Murchison (#16293)

Erik T. Koons

HOWREY SIMON ARNOLD & WHITE, LLP

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 783-0800

(202) 383-6610 (Fax)

Warren K. Kaplan (#02661)

Washington Lawyers' Committee for Civil

Rights and Urban Affairs

11 Dupont Circle, NW Suite 400

Washington, DC 20036

(202) 319-1000

(202) 319-1010 (Fax)

Dated: December 10, 2004

Attorneys for Plaintiff

Document Number: [29](#) 7 pages 254 kb

Attachment	Description
-------------------	--------------------

1	Amended Complaint	19 pages	0.8 mb
-------------------	----------------------	----------	--------

2	Red-Lined Version	20 pages	1.3 mb
-------------------	-------------------	----------	--------

		46 pages	2.3 mb
--	--	----------	--------